



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/734,309	12/12/2003	Patrick M. McCarthy	MYO1001US	1677
9561	7590	10/04/2006	EXAMINER	
POPOVICH, WILES & O'CONNELL, PA			ALTER, ALYSSA M	
650 THIRD AVENUE SOUTH			ART UNIT	PAPER NUMBER
SUITE 600				
MINNEAPOLIS, MN 55402			3762	

DATE MAILED: 10/04/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/734,309	MCCARTHY ET AL.	
	Examiner	Art Unit	
	Alyssa M. Alter	3762	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 12 December 2003.
- 2a) This action is FINAL. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-45 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-45 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 12 December 2003 is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ . |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ . | 6) <input type="checkbox"/> Other: _____ . |

DETAILED ACTION

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

1. Claims 1-45 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-85 of U.S. Patent No. 6,050, 936.

Although the conflicting claims are not identical, they are not patentably distinct from each other because both devices engaged the heart wall and affect mechanical properties of the heart.

2. Claims 1-45 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-25 of U.S. Patent No. US 6,406,420 B1.

Although the conflicting claims are not identical, they are not patentably distinct from each other because both devices apply materials to the heart to affect a target zone of the heart.

3. Claims 1-45 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-19 of U.S. Patent No. US 5,961,440.

Although the conflicting claims are not identical, they are not patentably distinct from each other because both devices require elongated members to be placed over the heart to modify heart movement.

4. Claims 1-45 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1 of copending Application No. 10/738,255. Although the conflicting claims are not identical, they are not patentably distinct from each other because both devices require elongated members to be placed over the heart to modify heart movement.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

1. Claims 1-45 are rejected under 35 U.S.C. 102(b) as being anticipated by Heilman et al. (US 5,383,840). Heilman et al. discloses a ventricular assist device to be applied to the heart. "The bottom or apical portion of the heart is supported by a collapsible net structure having limited expansion ability. Should an infarct (death) of the heart's muscle

occur from a blockage of a coronary artery, the band-stay-pad assembly with its attached net then will provide support and thus avoid or limit any aneurysmal ballooning or rupture of the heart that otherwise might occur" (col. 4, lines 21-28).

As to claims 6-7 and 27-28, since the net structure supports the apex of the heart, which as seen in figure 2 and 14C includes the ventricles, and the papillary muscled and the mitral valve are located in the ventricles, then the papillary muscles and the mitral valve are also covered by the net as well.

As to claims 9-10, 15, 30-31 and 39, "the pressure pad 130 is formed of a relatively soft material and has a smooth inner surface 130s which is engageable with the heart 22 without causing damage to the heart tissue. The pad material also is of a type, which can be sutured to the heart 22 and also preferably is relatively porous in nature to enhance tissue ingrowth and bonding of the pad to the heart, so that radial expansion of the band-stay-pad assembly 32 assists in expansion of the heart during its diastole phase. For example, a suitable material for this purpose is polyurethane foam, at least the inner heart-contacting surface 130s of which has been treated with an anti-microbial agent, such as cephalosporin" (col. 10, lines 3-15).

As to claims 13 and 37, "longitudinally and vertically extending force-transmitting springs that are supported on the pad assembly and respective ones of the pivoting stays, and have opposite end portions which flex outward as the band-stay-pad assembly compresses into the heart's surface. The return springs bias the compression band-stay-pad assembly circumferentially, and thus also radially outward, with the pad assembly being preferably secured to the heart's surface by suturing and/or ingrowth,

so that outward expansion of the heart, or diastolic filling, is assisted by the springs" (col. 3, lines 44-54).

As to claims 14 and 38, since the material is woven and braiding is a type of weaving. The examiner considers the material, as seen in figure 14C, to be a braided ring.

As to claims 16-19 and 40-43, "the parts 252 of the net 32-5 then may be used by a surgeon to pull the compression band-stay-pad assembly 32-5 into tight-fitting relationship with respect to the heart 22-5 when it is in its diastolic phase, whereupon the overlapped portions 252-0 may be suitably secured together. Thus, the compression band-stay-pad assembly 32-5 can be "custom-fit" to the heart 22-5, as noted previously" (col. 16, lines 18-25).

As to claims 20 and 44, Heilman et al. discloses in (col. 10, line 26), the use of a suitable adhesive for employment with the device.

Art Unit: 3762

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Alyssa M. Alter whose telephone number is (571) 272-4939. The examiner can normally be reached on M-F 9am to 4pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Angela Sykes can be reached on (571) 272-4955. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Alyssa M. Alter
Alyssa M Alter
Examiner
Art Unit 3762

George Evans
Primary 3762
9/25/16